Nos. 43 and 44

In the Supreme Court of the United States

OCTOBER TERM, 1942

HARRY BRAVERMAN, PETITIONER

v.

THE UNITED STATES OF AMERICA

ALLEN WAINER, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

INDEX

CITATIONS

Cases:

Cases—Continued.

Cases—Continued.

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OPINION BELOW

The opinion of the circuit court of appeals (R. 607–614) is reported at 125 F. (2d) 283.

JURISDICTION

The judgment of the circuit court of appeals was entered January 14, 1942 (R. 607); and petitioners' separate petitions for rehearing (R. 614) were denied on February 10 and March 2, 1942, respectively (R. 614–615). The petitions for writs of cer-

tiorari were filed March 9, 1942, and were granted April 14, 1942 (R. 615). The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925. See also Rule XI of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the trial court erred in imposing general sentences of eight years' imprisonment upon petitioners' convictions under an indictment which, in each of its seven counts, charged a conspiracy to violate a separate provision of the internal revenue laws, where the Government claimed that the seven counts alleged merely the illegal objects of a single continuing conspiracy and the case was submitted to the jury on that theory.

2. Petitioner Wainer also raises the question whether the six-year period of limitation prescribed by Section 3748 (a) of the Internal Revenue Code for the prosecution of offenses arising under Section 37 of the Criminal Code (the conspiracy statute), "where the object of the conspiracy is to attempt in any manner to evade or defeat any tax or the payment thereof," is inapplicable to the conspiracy charged in the indictment.

3. An additional question presented by petitioner Wainer is whether his plea of former jeopardy should have been sustained.[1]

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[1] The facts relating particularly to this contention are stated under Point III of the Argument, *infra*, pp. 56–57.

STATUTES INVOLVED

Section 37 of the Criminal Code (18 U. S. C. 88), reads:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

Section 3748 (a) of the Internal Revenue Code, so far as pertinent, is set forth at pp. 54–55, *infra*.

STATEMENT

On December 19, 1939, a conspiracy indictment in seven counts was returned against petitioners and 28 other defendants in the District Court of the United States for the Eastern District of Michigan. The indictment names seven other persons as co-conspirators but not as defendants, and also alleges that there were conspirators not known to the grand jurors. (R. 1–23.) The allegations of each count are alike as to parties, time and places of entry into and duration of the conspiracy therein charged.[2] Each count charges

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[2] The conspiracy was alleged in each count to have continued from November 1, 1935, to September 1, 1939, and to have been entered into in the Eastern District of Michigan and also in the states of Illinois, Wisconsin, and Ohio.

[3] The overt acts recited in each count are not, however, identical.

that the conspiracy therein alleged was to commit a particular offense against the internal revenue laws, viz: Count 1 (R. 1–6), to carry on the business of wholesale and retail liquor dealers without having the special occupational tax stamp as required by law (26 U. S. C. (1934 ed.) 1937 (a) (1); Section 3253, Internal Revenue Code); Count 2 (R. 6–10), to possess distilled spirits the immediate containers of which would not have affixed thereto stamps denoting the quantity of distilled spirits contained therein and evidencing payment of all internal revenue taxes imposed on such spirits (26 U. S. C. 1152 a. and g.; Section 2803 (a) and (g), Internal Revenue Code); Count 3 (R. 10–13), to transport large quantities of distilled spirits the immediate containers of which would not have affixed thereto the required stamps (26 U. S. C. 1152 a. and g.; Section 2803 (a) and (g), Internal Revenue Code); Count 4 (R. 13–15), to carry on the business of distillers without having given bond as required by law and with intent to defraud the Government of the tax on the spirits which would be distilled (26 U. S. C. 1184; Section 2833, Internal Revenue Code); Count 5 (R. 15–18), to remove, deposit and conceal distilled spirits in respect whereof a tax was imposed by law, with intent to defraud the United States of such tax (28 U. S. C. 1441 (a); Section 3321 (a), Internal Revenue Code); Count 6 (R. 18–20), to possess, keep in custody, control, and set up unregistered stills and dis-

tilling apparatus (26 U. S. C. 1162; Section 2810, Internal Revenue Code); and Count 7 (R. 21–23), to make and ferment mash fit for the distillation and production of distilled spirits on premises not duly authorized and designated according to law as a distillery (26 U. S. C. 1185; Section 2834, Internal Revenue Code).

Petitioners and four others were tried upon the indictment (R. 47).[4] Among the motions presented on behalf of petitioners was a motion for a directed verdict made at the close of the Government's case based upon the ground that the prosecution was barred by the three year statute of limitations, the indictment having been returned December 19, 1939, and the proof having shown that petitioners' connections with the conspiracy had terminated more than three years previous to that time (R. 422–423, 425). This motion was denied and an exception allowed (R. 439).[5]

At the close of the Government's case petitioners renewed a motion which they had made at the beginning of the trial (R. 47) to require the Government to elect upon which of the seven counts of the

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[4] The other defendants had either pleaded guilty or had not been apprehended. Harry Klein, a defendant under another indictment making the same charges which, however, named petitioners and their co-defendants as co-conspirators but not as defendants, was tried at the same time (R. 567, 569–570).

[5] Petitioner Wainer alone raises the limitations question in this Court.

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indictment it would proceed (R. 420–421, 425). Their view was that the indictment charged, and consequently the proof must show, that there were seven separate conspiracies with seven separate objectives, but that, since it was the theory of the Government that there was but one unlawful agreement, and the proof did not show that there were seven separate conspiracies, the Government should be required to choose upon which one of the conspiracies charged the case should be submitted to the jury (R. 421). In response, the Government's attorney took the position that the seven counts of the indictment charged the illegal objects of one continuing conspiracy and that the proof showed only one such conspiracy, but he claimed that under the decision of the Circuit Court of Appeals for the Sixth Circuit in *Fleisher* v. *United States*, 91 F. (2d) 404, separate conspiracy charges would lie because each of the illegal objects constituted a separate and distinct offense (R. 426–432).[6] The motion was denied and an exception taken (R. 439).

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[6] The following portions of the Government's argument are illustrative of its position (R. 426):

> The COURT. * * *
>
> Now, do I understand that each separate conspiracy has reference, first, to manufacture, to transportation, to failure to pay tax, and others?
>
> Mr. HOPPING [Assistant United States Attorney]. Yes, your Honor, those are the separate illegal objects, alleged as to [*sic*] the objects of this conspiracy.

Previously, after the Government witness Edward Kleppel, one of the defendants, had testified on cross-examination that he had pleaded guilty to

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The COURT. I want to hear you on the law as to what right you have to separate all of these, when, as a matter of fact, in my judgment, you call it one conspiracy.

The Assistant United States Attorney then proceeded to discuss the *Fleisher* case and stated (R. 426–428):

Mr. HOPPING. If we charge them merely with setting up the still, with conspiring to do that, that would have been a complete conspiracy, and the object of the conspiracy as a part of the charge of conspiracy, that is what the Court of Appeals held among other things in that case. A conspiracy isn't complete, or a charge of conspiracy, unless it is alleged what illegal object or what offense against the laws of the United States is to be committed. The agreement to set up a still without registering it, is a complete and separate offense of conspiracy.

The COURT. I agree with you on all of that. You haven't reached my point yet.

Mr. HOPPING. Then the same set of facts by which they set up the still without registering it, may also show that they entered into the business of distillers without giving bond, and that may be properly charged in the second count in the same indictment.

The COURT. Charging what?

Mr. HOPPING. Charging conspiracy.

The COURT. You might charge the substantive offense.

Mr. HOPPING. No; charge conspiracy in a second count, to carry on the business of distillers without giving bond, that was the second count in the Fleischer case. The same set of facts, the Court said, might partly be used to show that they agreed to and did manufacture mash to be used in the same distillery, and it is proper and permissible for the Government to charge a third count of conspiracy, the object to be to commit the other

the indictment and that he "just plead guilty to one conspiracy that I know of," the following

offense, to manufacture mash, and the fourth is to possess the alcohol, which is produced in that still. That is a fourth separate offense committed against the laws of the United States.

The COURT. There is no question of those offenses, as being all there.

Mr. HOPPING. Now, in the Fletcher [Fleisher] case, our Circuit Court said this: * * * Each of the offenses was separate and distinct, but it doesn't state that the conspiracies were separate and distinct, one having an object to commit this offense against the United States—this offense is in the second count—and another offense in the third count, which is permissible and is approved by the Court of Appeals of the Sixth Circuit in the United States versus Fleischer case.

The COURT. They say there was no record there. Wasn't there a printed record that they went up, solely on the sufficiency of the indictment?

Mr. HOPPING. On its face, yes. If the Government charged the seven counts as we have here, and failed to show any evidence that they agreed to enter into the wholesale and retail business, but merely showed that they manufactured and possessed the alcohol, we would undoubtedly fail within the language of this decision, which says that unless the Government shows proof of the object to commit another offense, it wouldn't be a separate offense. They were speaking merely of the indictment.

The Court then asked (R. 428): "What are you going to do in this case? This is quite a continuing affair. You are going to call upon this jury to sit down with a paper and pencil and keep track of all these names and say, 'Here, on that first conspiracy back there, these men down here weren't even members of it. Therefore, you can't convict them of that first conspiracy.'" Based upon a review of the evidence, the prosecuting attorney pointed out that the con-

question was propounded and the following colloquy ensued (R. 247–248):

> Q. The indictment charges seven conspiracies.
>
> The COURT. Well, let's settle that. That is an extravagant statement. You claim there are seven conspiracies?
>
> Mr. FREDERICK [counsel for petitioner Brayerman]. Set up in seven separate counts. Each count sets up a conspiracy, yes, your Honor, seven counts. Each count sets up a conspiracy.
>
> The COURT. Is that right?
>
> Mr. HOPPING [Assistant United States Attorney]. I would not say that that was, your Honor. It is one count——
>
> The COURT. Well, never mind.
>
> Mr. HOPPING. One conspiracy indictment and seven counts charging seven illegal objects of the conspiracy.

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spiracy was a single continuing conspiracy pursuant to which certain of the original conspirators, aided by others who from time to time joined the conspiracy, engaged in certain offenses against the Internal Revenue laws, the carrying on of a wholesale and retail liquor business, the transportation of liquor, the operation of a still, etc. (R. 428–432). During the course of his discussion the prosecutor stated: "The conspiracy is one as to time and place, as to all of the parties named in the indictment. That is our theory." (R. 428.) "Now, they continue on with that kind of operation, even getting the raw materials back from Cleveland by Roadway Transit, sending them into the warehouse, and reloading these boxes, which is certainly a wholesale business. It is part of the same conspiracy, but that is a separate offense and is a different character of offense from the still" (R. 431).

The trial court refused to charge the jury on the theory that there were seven separate conspiracies (R. 33, 589)[7] and the case was submitted to the jury on the basis of the Government's claim that there was one continuing conspiracy to commit seven offenses (R. 573–575, 580–581, 585–587).[8]

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[7] The 12th request to charge, which was refused, was as follows (R. 33):

> I charge you ladies and gentlemen of the jury, that in considering the seven counts of this indictment, you must consider them as separate offenses and before a verdict of guilt may be rendered upon all, you must be satisfied from the testimony in the case and beyond reasonable doubt that there has been proof showing the existence of the separate agreements or conspiracies charged. If you find that there was but one agreement having as its purpose the accomplishment of an unlawful end and which encompassed the purposes set forth in the various counts of this indictment, it then becomes your duty to find the defendant, Harry Brayerman, not guilty of the charges here made against him.

[8] Thus, the Court said in its charge: "The Government, briefly, claims this: That these men entered into a conspiracy, what would be known, in law, as a continuing conspiracy. * * * The Government claims in this case that this was a continuing conspiracy. It started back at the time alleged in the indictment and continued down for several years. That these men, or some of them, got together and proposed to engage in the illicit handling of alcohol, the manufacturing of alcohol." (R. 573.) "It further claims that that scheme, that plan, was carried on for a long period of time; for several years. It claims that these defendants had a part to do in it. * * *. And the Government claims, and that is; briefly, that these Defendants are all liable because it claims the evidence shows that they entered into a conspiracy to commit a crime against the United States; to violate the law, handling illicit alcohol without

The jury returned a general verdict finding petitioners "guilty as charged" (R. 35),[9] and each was sentenced generally to eight years' imprisonment and the payment of a fine of $2,000 (R. 35–37).[10] On appeal by petitioners (R. 39–43)[11] and another defendant[12] the Circuit Court of Appeals affirmed the judgments of conviction (R. 607, 614).

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tax, operating a still, in violation of the regulations, transporting alcohol, and numerous offenses as charged in this indictment" (R. 575). "Having in mind that charge, with reference to a conspiracy, you must then proceed under the rules of law, which I have given you, to determine: first, was there a conspiracy entered into by these Defendants upon trial, as I have defined a conspiracy" (R. 580–581). There were repeated admonitions that the jury must find that there was "a" conspiracy and that the defendants were members of "this" conspiracy or "the" conspiracy (see R. 583, 585–587). As further reflecting the understanding of the trial court that there was factually but one conspiracy, that court, in ruling upon an objection by defense counsel, said (R. 300): "The difficulty is you have got a long drawn out affair here—a big conspiracy, if there is one, with many involved. And the acts of various alleged members, if there is a conspiracy, bind upon all of them."

[9] The jury disagreed upon a verdict as to two of the defendants on trial and found the other two, Morris Frank and Harry Klein, guilty (R. 35).

[10] The record does not contain the proceedings in conjunction with the passing of the sentences.

[11] Their grounds of appeal and assignments of error disclose that they attacked the legality of their sentences (R. 43, 600) as well as the overruling of their contention that the statute of limitations barred their prosecution (R. 41, 595).

[12] This defendant, Frank, who received the same sentence as petitioners (R. 37) joined in the appeal (R. 43–46, 590–594, 613) but elected to enter upon service of his sentence

As we read the opinion of that court, while it does not advert specifically to the theory upon which the case was tried and submitted to the jury it does not deny that the evidence established factually but a single continuing conspiracy, but holds that where, as in the instant case, such a conspiracy contemplates the commission of seven distinct offenses against the internal revenue laws, it is proper to allege seven separate conspiracies and punish each separately (R. 608–609, 611, 612, 613). It reaches this conclusion by applying, as earlier it had done in the *Fleisher* case, *supra* (91 F. (2d) 404), the principle enunciated by this Court in *Blockburger* v. *United States*, 284 U. S. 299, 304, "that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not," [11] and by reasoning that since each of the substantive offenses which were the objects of the conspiracy required proof of "an added element of criminality not contained

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pending appeal (R. 591). He did not petition for a writ of certiorari to review the affirmance of his conviction. The defendant Klein abandoned his appeal (R. 612).

[11] *Gavieres* v. *United States*, 220 U. S. 338, 342; *Albrecht* v. *United States*, 273 U.S. 1, 11–12. A shorter statement of the test of identity of offenses, given in *Carter* v. *McClaughry*, 183 U. S. 365, 394, is whether "the same evidence is required to sustain them". See also *Morgan* v. *Devine*, 237 U. S. 632, 641.

in any other law", this permitted the charging of a separate conspiracy to cover each substantive offense and punishment upon that basis (R. 608–609, 611).[14]

[14] In so holding the court below said (R. 611): "Upon the principles of law which have been adduced, we find that the record reveals sufficient substantial evidence to justify the verdict of the jury convicting the three appellants upon all seven counts of the indictment, *each of which embraces an added element of criminality not contained in any other law.* [See in this connection the court's italicization of the allegations of the indictment as to the various objective offenses (R. 607).] The conspiracies laid in each count are therefore separate and distinct crimes, separately punishable. * * * The fact that the conspiracy was also a general one to violate all laws repressive of its consummation does not gainsay the separate identity of each of the seven conspiracies. From the evidence may be readily deduced a common design of appellants and others, followed by concerted action, to ship disguised contraband liquor from Chicago to eastern Michigan to make mash, to set up stills, to operate illicit distilleries, to conceal the stillrun product in warehouses apart from the distilleries, to possess and also to transport the liquor in unstamped containers, and to operate both a wholesale and a retail liquor business without giving bond as required by law or having the required excise tax stamps." (Italics supplied.) The court also speaks in other places of "the widespread, comprehensive conspiracy" and of "the conspiracy" (R. 612–613). Its review of the evidence also presents the picture of a single continuing conspiracy (see R. 612–613).

Since the Government proceeded in the trial court and the case was submitted to the jury upon the theory that there was but a single continuing conspiracy and, hence, the validity of petitioners' sentences depends upon the correctness of the rule of law indubitably applied by the district court and expressly relied upon by the circuit court of appeals, we deem it unnecessary to make any recital of the

The circuit court of appeals further ruled that there was no merit in the petitioners' contention that their prosecutions were barred by the statute of limitations.[15] It said that the limitation period is by the plain language of the statute [second paragraph of Section 3748 (a) of the Internal Revenue Code, *infra*, pp. 54–55] six years and not three years (R. 613–614).

SUMMARY OF ARGUMENT

I. Petitioners' eight year sentences are insupportable. The Government conceded in the trial court that the several counts of the indictment charged the illegal objects of a single continuing conspiracy, the case was submitted to the jury on that premise, the jury necessarily found that petitioners were each guilty of participating in the single conspiracy; and petitioners' sentences were approved by the circuit court of appeals, despite the existence of a single conspiracy, solely on the theory that such punishment would lie because of the distinctiveness of the offenses which were the objects of the conspiracy. At common law and under Section 37 of the Criminal Code, as is made manifest by numerous decisions of this Court, the heart of the offense is the

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evidence. As indicated, the evidence is summarized in brief form in the opinion of the circuit court of appeals at R. 612–613; see also R. 429–432.

[15] As heretofore stated, this contention is presented in this Court only by petitioner Wainer.

agreement among the conspirators to commit an offense against the Government, the collective planning of criminal conduct, the confederating or combining for criminal purposes, the conspiracy. A single unlawful agreement constitutes but one offense under Section 37, however diverse its criminal objects. The maximum imprisonment sentence which may be imposed upon petitioners is, therefore, two years.

This view is supported by those decisions in the lower federal courts which, unlike the decision below and kindred decisions, recognize the fundamental concept that the real offense under the statute is the confederating together. This Court's denial of a petition for a writ of certiorari to review the decision of the court below in *Fleisher* v. *United States*, 91 F. (2d) 404, lends no real strength to that court's decision in the instant case in view of the circumstances of the *Fleisher* case.

II. Petitioner Wainer's contention that his prosecution was barred because he withdrew from the conspiracy more than three years (but not more than six years) prior to the returning of the indictment is without merit. It is clear that the conspiracy charged falls within the second paragraph of Section 3748 (a) of the Internal Revenue Code, and, therefore, that the six year limitation applies.

III. Petitioner Wainer is not now in a position to urge that the trial court should have sustained his plea of former jeopardy. If consideration may be given to that contention, that court was not made

cognizant of any facts which would have justified it in concluding that there was merit in the plea.

ARGUMENT

I

PETITIONERS' EIGHT YEAR SENTENCES MAY NOT STAND

We agree with petitioners in their contention that their eight year sentences are insupportable. We think that under the conspiracy statute they may not be sentenced to imprisonment for more than two years.[17]

A. THEORY OF THE DECISION BELOW AND SUPPORTING DECISIONS

It cannot be doubted that the Government proceeded in the trial court and that the case was submitted to the jury on the premise that there was but a single continuing conspiracy to commit seven offenses against the internal revenue laws, and that the circuit court of appeals entertained no different idea. It is also apparent, we believe, that not only

[17] While, to support his contention, petitioner Braverman relies on the Fifth Amendment (Br. 7), presumably, the provision "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb", sometimes thought of as the "double punishment provision" (cf. *Albrecht* v. *United States*, 273 U. S. 1, 11; *Murphy* v. *United States*, 285 Fed. 801, 817 (C. C. A. 7)), we do not believe that consideration need be given to the Fifth Amendment since, in our opinion, a correct interpretation of the conspiracy statute justifies the contention.

the circuit court of appeals, in sustaining petitioners' sentences, but the trial court in imposing them, acted upon the theory that, although there was in fact but one conspiracy,[18] it was permissible, under the test of identity of offenses stated by this Court in *Blockburger* v. *United States* (*supra*, p. 12), to charge and to punish as if there were seven conspiracies because each of the seven objective offenses required proof of some element of criminality not involved in the others.[19]

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[18] A conspiracy to bring about a continuing result rather than to do but one misdeed is nevertheless single. *United States* v. *Kissel*, 218 U. S. 601, 607; *Hyde* v. *United States*, 225 U. S. 347, 369; *Brown* v. *Elliott*, 225 U. S. 392, 400; *Ford* v. *United States*, 273 U. S. 593, 602. See also *United States* v. *Borden Co.*, 308 U. S. 188, 202; *Interstate Circuit* v. *United States*, 306 U. S. 208, 227; *In re Snow*, 120 U. S. 274, 281, 286; *United States* v. *Manton*, 107 F. (2d) 834, 839 (C. C. A. 2), certiorari denied, 309 U. S. 664. In the *Kissel* case, p. 607, it was said: "* * * when the plot contemplates bringing to pass a continuous result that will not continue without the continuous cooperation of the conspirators to keep it up, and there is such continuous cooperation, it is a perversion of natural thought and of natural language to call such continuous cooperation a cinematographic series of distinct conspiracies, rather than to call it a single one."

[19] Thus in its opinion in the *Fleisher* case, upon which it heavily relies, the court below said (91 F. (2d), at 496): "The same proof would not necessarily establish these separate charges. A conspiracy to set up an unregistered still could be proved without presentation of evidence of the conspiracy to manufacture mash, and vice versa. This is true as to a conspiracy to operate a still without giving bond, and unlawfully to possess unstamped containers of liquor. Certain entirely distinct elements are required to establish the conspiracy described in each count, and hence four distinct offenses are charged."

Admittedly the decision of the circuit court of appeals finds support not only in its decision in the *Fleisher* case [20] and other decisions of that court [21] but in decisions of the circuit courts of appeals for several other circuits which utilize, in part at least, the same process of reasoning in disposing of the question of punishment in conspiracy cases or the analogous question of double jeopardy in such cases. *Beddow* v. *United States*, 70 F. (2d) 674, 676 (C. C. A. 8); [22] *Thomas* v. *United States*, 156

[20] While certiorari was denied by this Court on the question of the validity of the sentence in that case, 302 U. S. 673, the case is, in reality, distinguishable from the instant case for reasons hereinafter stated (*infra*, pp. 49–52).

In the *Fleisher* case the court cited in support of its conclusion, among others, the cases of *United States* v. *Wexler*, 79 F. (2d) 526 (C. C. A. 2); *Leonard* v. *United States*, 18 F. (2d) 208, 213 (C. C. A. 6); *King* v. *United States*, 31 F. (2d) 17 (C. C. A. 9); *Slade* v. *United States*, 85 F. (2d) 786 (C. C. A. 10), and *Chrysler* v. *Zerbst*, 81 F. (2d) 975 (C. C. A. 10). These cases did not involve at all, however, the question of identity of offenses as between conspiracy counts or indictments.

[21] *Meyers* v. *United States*, 94 F. (2d) 433; *Parmenter* v. *United States*, 2 F. (2d) 945, 946 (while this decision gives some slight support to the court's view, the opinion indicates (p. 948) that under the proof there may have been in fact two separate conspiracies). *Leonard* v. *United States*, 18 F. (2d) 208, 213, a prior decision by the court below which it cites in its opinion in the instant case (R. 608), is not a conspiracy case, but its citation well illustrates the emphasis which that court places on the distinctiveness of the substantive offenses in passing upon the propriety of the punishment for conspiracy.

[22] *Powe* v. *United States*, 11 F. (2d) 598 (C. C. A. 5), cited in this case, is in essence a decision to the contrary, in

Fed. 897, 912–913 (C. C. A. 8);[23] *Yeykichi Ito* v. *United States*, 64 F. (2d) 73, 77 (C. C. A. 9);[24] *Olmstead* v. *United States*, 19 F. (2d) 842, 847 (C. C. A. 9);[25] *Vlassis* v. *United States*, 3 F. (2d) 905,

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our opinion (see pp. 42–43, *infra*). In *Pollock* v. *United States*, 35 F. (2d) 174 (C. C. A. 4), also cited by the court, the recitation of the evidence (p. 175) would indicate that there were in fact two separate conspiracies and there is nothing in the remainder of the opinion to negative that conclusion. In *Henry* v. *United States*, 15 F. (2d) 365 (C. C. A. 1), also relied upon by the court, the question whether the case should have been submitted to the jury upon a plea of *autrefois acquit* was decided solely upon the basis of two indictments naming but one common conspirator (Henry) and averring different overt acts; no other evidence was before the court. There was no reliance upon any difference in objective offenses. It was impossible upon the face of the indictments to determine whether they charged the same conspiracy.

[23] In this case, which involved the question of former jeopardy, the evidence may have shown but one conspiracy in fact, but the opinion is not clear. The opinion is also muddied by a recognition, in connection with other rulings, that the real offense under Section 37 of the Criminal Code is the conspiring or combining for illegal purposes. See pp. 902, 906–907.

[24] In this case, however, as is apparent from the court's opinion, the court's discussion of the question of double punishment was *obiter dictum*, since concurrent sentences had been imposed under the two counts of the conspiracy indictment.

[25] While this case ultimately reached this Court on writ of certiorari limited to the question of the admissibility of evidence obtained by wire tapping (277 U. S. 438, 455), Olmstead did not, either in his petition for writ of certiorari or in his petition for a rehearing of the order originally de-

906 (C. C. A. 9);[26] *Schultz* v. *Hudspeth*, 123 F. (2d) 729, 731–732 (C. C. A. 10);[27] see also *Piquett* v. *United States*, 81 F. (2d) 75, 79–80 (C. C. A. 7);[28] *Bertsch* v. *Snook*, 36 F. (2d) 155, 156 (C. C. A. 5);[29] *Francis* v. *United States*, 152 Fed. 155, 156, 157 (C. C. A. 3).[30] In several of these

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nying certiorari (No. 493, October Term, 1927), raise the question whether the consecutive sentences imposed upon him under the two conspiracy counts were valid. The circuit court of appeals did not discuss the question of punishment from the standpoint of what the evidence showed as to the number of conspiracies, but merely upon the basis of what the indictment charged. In its opinion this Court refers to the petitioner as having been convicted of "a conspiracy". (277 U. S., at 455.)

[26] The discussion in this case is, however, very meager. Additionally, the evidence was not before the court.

[27] In this case the question of double punishment arose on *habeas corpus* and consequently the evidence was not before the court. The case is now pending in this Court on petition for a writ of certiorari in *forma pauperis* (No. 6), and the Government has filed a memorandum in reply in which it states that it cannot support the judgment of the circuit court of appeals on the ground upon which that court predicated its decision, but attempts to sustain that judgment upon other grounds.

In *Telman* v. *United States*, 67 F. (2d) 716 (C. C. A. 10), cited by the court below in the instant case (R. 608), so far as appears from the opinion the question of double punishment was not raised or passed upon.

[28] In this case, however, it would seem evident from the court's opinion (pp. 79–80) that the two conspiracies were distinct in point of fact. Cf. also the decisions by the same court recited at pp. 38–42, *infra*.

[29] In this case the correct result was undoubtedly reached, but by erroneous reasoning. See footnote 56, *infra*, pp. 43–44.

[30] The discussion in this case, however, is very abbreviated.

cases the evidence was not before the court, but the rationalization in the decisions would seemingly have justified a conclusion that more than one conspiracy could have been charged and cumulative maximum punishments inflicted even if the evidence had shown that there had been, in fact, but one conspiracy.[31]

B. THE DECISION BELOW AND SUPPORTING DECISIONS IGNORE THE WELL-ESTABLISHED PRINCIPLE THAT THE GIST OF THE OFFENSE IS THE CONFEDERATING TOGETHER

We submit that the decision below and kindred decisions in emphasizing the distinctiveness of the objective offenses and then, by that medium, spelling out multiple conspiracy charges, cumulatively punishable, ignore a fundamental concept in the law of criminal conspiracy, long established and repeatedly enunciated under varying circumstances by this and other courts—i. e., that the real offense is the combining, the confederating, for unlawful purposes, the conspiracy, and not the substantive offenses which are the objects of the conspiracy or the overt acts in furtherance of the conspiracy. In consequence these decisions inappropriately apply a test designed, primarily at least, for the resolution of the question of identity

[31] Parenthetically it may be observed that our research has disclosed that the reasoning employed in the above cases is sometimes at odds with that utilized in other cases decided by the same courts involving problems basically analogous.

of offenses where substantive crimes are concerned.[22]

(1) *Conspiracy at the Common Law.*—Tracing the growth of the law of criminal conspiracy, Francis B. Sayre, in a comprehensive article in 35 Harvard Law Review 393, points to the final emergence of the offense in the Third Ordinance of Conspirators, 33 Edw. I, passed in 1304, which in certain respects summed up the pre-existing law and gave a precise definition of conspiracy but was confined to combinations to procure false indictments, to bring false appeals, or to maintain vexations suits. In the *Poulterers' Case,* 9 Coke 55 b, decided in 1611, the doctrine was immeasurably broadened by the Court of Star Chamber when it ruled in an action for damages brought against false accusers that it was no defense that the victim of the false accusation had never been indicted or acquitted. The Court of Star Chamber definitely held that, as in conspiracies for maintenance, the confederating together constituted the gist of the offense, rather than the false indict-

[22] In the *Blockburger* case (284 U. S. 299, 303–304), which states the test of identity of offenses relied upon by the court below, the question was whether a single sale of morphine, violating the provisions of Section 1 of the Narcotic Act, forbidding sale except in or from the original stamped package, and of Section 2, forbidding sale not in pursuance of a written order of the person to whom the drug is sold, constituted two offenses or merely one.

ment and subsequent acquittal. Then, to quote Sayre (pp. 398–399):

> From the doctrine announced by this decision, it was an easy step to the very general doctrine that since the gist of the crime is the conspiracy, no other overt act is necessary; and this came to be the well-acknowledged law of criminal conspiracy. In the ancient phraseology, it was not necessary to show that anything had been "put in ure"; the mere conspiracy alone was held to constitute the gist of the offense and to be therefore indictable. * * * the principle, thus early decided, has come to be a universal and well-settled doctrine of the modern law of conspiracy. * * *

This, as Sayre says (p. 399), was not "out of accord with the well-recognized principle of criminal law that without some overt act no one can be convicted of a common-law crime, no matter how black his intent may have been. For the conspiring together itself constitutes an overt act which may well furnish the basis of criminal liability." [33]

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[33] See *Hyde* v. *United States*, 225 U. S. 347, 359; *Bannon and Mulkey* v. *United States*, 156 U. S. 464, 468. Even now, under the Sherman Anti-Trust Act, there is no necessity for the purpose of criminal responsibility to prove any overt act other than that of conspiring. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 225, 252; *United States* v. *Trenton Potteries*, 273 U. S. 392, 402. That is true of other federal conspiracy statutes. See *e. g.* Section 6 of

During the seventeenth century, according to Sayre (p. 400), the courts took a second important step in extending and broadening the limits of the crime of conspiracy. Prior to that century the crime had been confined very strictly to combinations to defeat the just administration of the law, such as the procuring of false indictments, embracery, and maintenance. In that century the courts began to extend the offense so as to cover combinations to commit all crimes of whatsoever nature, misdemeanors as well as felonies. There then developed gradually, in accordance with the spirit of the times, a tendency in the direction of undertaking to punish acts immoral as well as those violative of express law, and the idea gained currency on many sides that courts should similarly undertake to punish conspiracies to commit immoral as well as those to commit illegal acts. To reach the result that a conspiracy conviction should be allowed for a combination to commit an act not in itself criminal, dependence was placed upon the well-acknowledged formula that the conspiracy constitutes the gist of the crime (Sayre, pp. 401–405); impetus was given to the new doctrine by the famous but vague epigram of Lord

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the Criminal Code (18 U. S. C. 6); Section 19 of the Criminal Code (18 U. S. C. 51).

Under the common law theory overt acts may be of importance as evidence of the conspiracy or as matters of aggravation. *Hogan* v. *O'Neill*, 255 U. S. 52, 55.

Denman in *Jones' Case*, 4 B. & Ad. 345, 349 (1832), that a conspiracy indictment must "charge a conspiracy either to do an unlawful act or a lawful act by unlawful means" (p. 405); and by the early nineteenth century the doctrine had had frequent reiteration and some application in cases both in England and in this country (pp. 406–409). Thus in *State* v. *Burnham*, 15 N. H. 396, a case decided in 1844, it was said (pp. 402, 403):

> An act may be immoral without being indictable, where the isolated acts of an individual are not so injurious to society as to require the intervention of the law. But when immoral acts are committed by numbers, in furtherance of a common object, and with the advantages and strength which determination and union impart to them, they assume the grave importance of a conspiracy, and the peace and order of society require their repression.[34] * * *
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> * * * * *
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> When it is said in the books that the means must be unlawful, it is not to be understood that those means must amount to indictable offences, in order to make the offence of conspiracy complete. It will be enough if they are corrupt, dishonest, fraudulent, immoral, and in that sense illegal, and it is in the combination to make

[34] See *Callan* v. *Wilson*, 127 U. S. 540, 555–556; *Federal Trade Commission* v. *Raymond Company*, 263 U. S. 565, 574; *Redford Co.* v. *Stone Cutters' Ass'n*, 274 U. S. 37, 54.

use of such practices that the dangers of this offence consist.[35]

It is manifest, therefore, that under what may be termed the common law of criminal conspiracy the crime consisted of the combination or confederation, the conspiracy; that not even an overt act was required, the conspiracy itself being regarded as a sufficient overt act; and that, indeed, according to many authorities, the conspiracy need not contem-

[35] Applications of this doctrine are given in the following quotation from the work on *Criminal Law* of Justice Miller of the United States Court of Appeals for the District of Columbia (pp. 112–114):

> As has been already indicated, many combinations have as their objects the commission of crimes against persons. However, the law of conspiracy goes beyond such combinations and includes also combinations corruptly, dishonestly or fraudulently to injure, or oppress or prejudice other individuals, although the act contemplated, if done by one person, would be not criminal or even tortious in character. It has frequently been held a crime to conspire to defraud a person out of his property where the fraud amounted neither to a cheat at common law, nor to false pretenses under the statute. It has also been held criminal to conspire to do many other acts not punishable as crimes, as, for instance, to seduce a female where seduction was not a crime; to procure a fraudulent and sham marriage; to effect the escape of a female infant for the purpose of marriage, against her father's will; to procure a fraudulent divorce; to induce a woman to prostitute herself; to slander a person, or otherwise injure him in his character or business; to charge a person with being the father of a bastard, in order to extort money; to have a sane person declared insane. * * *

plate even a criminal act or criminal means,[36] the mere combining or confederating of the conspirators being regarded as sufficiently anti-social to justify public condemnation.[37] Certainly under the common law theory that the crime was the conspiracy, there could be no basis for the view that a single conspiracy could be split into two or more conspiracies for the purpose of trial and punishment merely because there was a variety of criminal objects or means in contemplation.

(2) *Conspiracy under Section 37 of the Criminal Code.*—Section 37 of the Criminal Code, it is true, specifically requires proof: (1) that the conspiracy be one to commit an offense against the United States, and (2) that one or more of the conspirators have done some act to effect the object of the con-

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[36] In *Duplex Co.* v. *Deering*, 254 U. S. 443, 465, a Sherman Act case, the Court said that "the accepted definition of a conspiracy is, a combination of two or more persons by concerted action to accomplish a criminal or unlawful purpose, or to accomplish some purpose not in itself criminal or unlawful by criminal or unlawful means. *Pettibone* v. *United States*, 148 U. S. 197, 203." See also *Callan* v. *Wilson*, 127 U. S. 540, 555–556.

[37] Sayre's historical summary was made as a prelude to his criticism of the doctrine that a combination may be punished criminally even though neither the object thereof nor the means utilized are criminal, his view being that the doctrine is logically unsound and historically is founded on misconceptions and erroneous applications of ambiguous statements (p. 409 *et seq.*). It is evident, however, that the doctrine gained considerable prominence at the common law. See footnote 4 to the opinion in *Gebardi* v. *United States*, 287 U. S. 112, 120, quoted at p. 29, *infra*.

spiracy. But, we submit, the purpose of these requirements was not to disturb the concept at common law that the gist of the offense is the conspiracy.

The definition of a conspiracy at common law similarly embraced the idea that criminal responsibility ensued if the unlawful agreement had in contemplation the commission of a crime, yet it was never doubted that the offense really was the combining or confederating, the conspiring together. That this is the evil at which Section 37 of the Criminal Code aims likewise cannot be doubted. In *United States* v. *Rabinowich*, 238 U. S. 78, in answering the argument that it would be unreasonable or inconsistent with the general policy of the Bankruptcy Act to allow a longer period for the prosecution, under Section 37 of the Criminal Code, of a conspiracy to violate one of the penal clauses of the Bankruptcy Act than for the violation itself, this Court said (p. 88):

> * * * For two or more to confederate and combine together to commit or cause to be committed a breach of the criminal laws, is an offense of the gravest character, sometimes quite outweighing, in injury to the public, the mere commission of the contemplated crime. It involves deliberate plotting to subvert the laws, educating and preparing the conspirators for further and habitual criminal practices. And it is characterized by secrecy, rendering it difficult of detection,

> requiring more time for its discovery, and adding to the importance of punishing it when discovered.[38]

Also, as was pointed out by this Court in *Gebardi* v. *United States*, 287 U. S. 112, 120, footnote 4:

> The requirement of the statute that the object of the conspiracy be an offense against the United States, necessarily statutory, *United States* v. *Hudson*, 7 Cranch 32, avoids the question much litigated at common law (see cases cited in Wright, The Law of Criminal Conspiracies [Carson ed. 1887] and in Sayre, Criminal Conspiracy, 35 Harv. L. Rev. 393) of the Criminality of combining to do an act which any one may lawfully do alone.[39]

Nor did the requirement of Section 37 that one or more of the conspirators must do some overt act alter the essential nature of the offense as being the conspiracy. Despite the controversy which arose in *Hyde* v. *United States*, 225 U. S. 347, and *Brown* v. *Elliott*, 225 U. S. 392, decided on the same day, which divided this Court five to four, as to whether the overt act is in any sense a part of the crime or whether the requirement thereof, as earlier held by

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[38] See also *Callan* v. *Wilson*, 127 U. S. 540, 555–556.

[39] Sayre severely attacks the logic of the common law idea that criminality may result when two persons join together to commit that which one can lawfully do alone (p. 409–411). He is also critical of the common law idea on the ground that it robs the law of definiteness (p. 412 *et seq.*).

the Court,[41] is merely to afford a *locus penitentiae*,[42] there can be no doubt that the heart of the offense is still the conspiracy. Even the majority in those cases, tacitly at least, recognized this when they held, in effect, that the overt act renewed and continued the conspiracy in time and place (*Hyde*, p. 363; *Brown* v. *Elliott*, pp. 400–401).[43] And in the later case of *Joplin Mercantile Co.* v. *United States*, 236 U. S. 531, 535–536, this Court said that an overt act, although essential to the completion of the crime, is still in a sense "something apart" from the conspiracy, being "an act to effect the object of

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[41] *United States* v. *Britton*, 108 U. S. 199, 204–205.

[42] In the *Hyde* and *Brown* v. *Elliott* cases it was held by the majority that consistently with the Sixth Amendment a conspiracy could be prosecuted in any district in which an overt act was performed, and that the period of limitation must be computed from the date of the last overt act specified in the indictment.

[43] As is apparent from *People* v. *Mather*, 4 Wend. (N. Y.) 229, 261, relied upon by the majority in the *Hyde* case (pp. 364–365), the unlawful agreement is considered as renewed or continued as to all of the conspirators wherever and whenever any one of them does an act in furtherance of their common design. And in *United States* v. *Kissel*, 218 U. S. 601, 608, cited by the majority in both the *Hyde* case (pp. 367, 369) and in *Brown* v. *Elliott* (p. 400), it was said: "A conspiracy is a partnership in criminal purposes. That as such it may have continuation in time is shown by the rule that an overt act of one partner may be the act of all without any new agreement specifically directed to that act." See also *United States* v. *Borden Co.*, 308 U. S. 188, 202; *Interstate Circuit* v. *United States*, 306 U. S. 208, 227; *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 227, 253–254.

the conspiracy." Also, the provision for an overt act was more nearly in accord with the philosophy of criminal responsibility that one should not be punished for an evil design unless he has taken some step to carry it out, than was the common law idea that the confederation or agreement was alone sufficient. *Bannon and Malkey* v. *United States*, 156 U. S. 464, 469.

C. NUMEROUS DECISIONS OF THIS COURT ARE BASED UPON THE PREMISE THAT THE REAL OFFENSE UNDER SECTION 37 IS THE AGREEMENT FOR CONCERTED CRIMINAL ACTION, THE CONSPIRACY

Irrespective of the criticism in the *Hyde* case of definitions appearing in earlier decisions by this Court which might have excluded the overt act as in any sense a part of the crime under Section 37 (p. 359); this Court has never departed from the view, which it has expressly articulated in numerous cases, that that at which Section 37 and similar federal conspiracy statutes[44] is aimed is not the offense which is the object of the conspiracy or the overt act to effect that object, but the agreement among the conspirators to commit an offense against the Government, the collective planning of criminal conduct, the confederating or combining for criminal purposes, the conspiracy.[45] Moreover,

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[44] See, *e. g.*, the Federal Kidnapping Act (18 U. S. C. 408c); the Espionage Act of June 15, 1917, c. 30, Title I, sec. 4, 40 Stat. 217, 219 (50 U. S. C. 34).

[45] *United States* v. *Falcone*, 311 U. S. 205, 210; *Gebardi* v. *United States*, 287 U. S. 112, 121; *Wong Tai* v. *United States*, 273 U. S. 77, 81; *Frohwerk* v. *United States*, 249 U. S.

the Court has decided too many cases on this premise, even where it has not expressed the thought in concrete terms, for it to be open to question. While none of these decisions involved the precise question here presented, we submit that they make the answer to it inevitable.

Thus in the leading case of *United States* v. *Rabinowich*, 238 U. S. 78, this Court, in reviewing the earlier decisions, said (pp. 85–86):

> It is apparent from a reading of § 37, Crim. Code (§ 5440, Rev. Stat.), and has been repeatedly declared in decisions of this court, that a conspiracy to commit a crime is a different offense from the crime that is the object of the conspiracy. *Callan* v. *Wilson*, 127 U. S. 540, 555; *Clune* v. *United States*, 159 U. S. 590, 595; *Williamson* v. *United States*, 207 U. S. 425, 447; *United States* v. *Stevenson* (No. 2), 215 U. S. 200, 203. And see *Burton* v. *United States*, 202 U. S. 344, 377; *Morgan* v. *Devine*, 237 U. S. 632.[*] The conspiracy, however fully formed, may fail of its object, however earnestly pursued; the contemplated crime may never be consummated; yet the conspiracy

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294, 210; *Williamson* v. *United States*, 207 U. S. 425, 447; *Hyde* v. *Shine*, 199 U. S. 62, 76; *Bannon and Mulkey* v. *United States*, 156 U. S. 464, 468; *Dealy* v. *United States*, 152 U. S. 539, 547; *Pettibone* v. *United States*, 148 U. S. 197, 202; *United States* v. *Britton*, 108 U. S. 199, 204; *United States* v. *Hirsch*, 100 U. S. 33, 34.

[*] See also *United States* v. *McElvain*, 272 U. S. 633, 639; *United States* v. *Hutto*, *No. 1*, 256 U. S. 524, 529; *Ford* v. *United States*, 273 U. S. 593, 619.

is none the less punishable. *Williamson* v. *United States, supra.*[47] And it is punishable as conspiracy, though the intended crime be accomplished. *Heike* v. *United States*, 227 U. S. 131, 144.

Nor do we forget that a mere conspiracy, without overt act done in pursuance of it, is not criminally punishable under § 37, Crim. Code. *United States* v. *Hirsch*, 100 U. S. 33, 34; *Hyde* v. *Shine*, 199 U. S. 62, 76; *Hyde* v. *United States*, 225 U. S. 347, 359. There must be an overt act; but this need not be of itself a criminal act; still less need it constitute the very crime that is the object of the conspiracy. *United States* v. *Holte*, 236 U. S. 140, 144; *Joplin Mercantile Co.* v. *United States*, 236 U. S. 531, 535, 536.[48] Nor need it appear that all the conspirators joined in the overt act. *Bannon* v. *United States*, 156 U. S. 464, 468. A person may be guilty of conspiring although incapable of committing the objective offense. *Williamson* v. *United States, supra*; *United States* v. *Holte, supra.*[49] And a single conspiracy might have for its object the violation of two or more of the criminal laws, the substantive offenses having perhaps different periods of

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[47] See also *Goldman* v. *United States*, 245 U. S. 474, 477; *United States* v. *Manton*, 107 F. (2d) 834, 846 (C. C. A. 2), certiorari denied, 309 U. S. 664.

[48] See also *Pierce* v. *United States*, 252 U. S. 239, 244.

[49] See *Gebardi* v. *United States*, 287 U. S. 112, and the instances therein given in footnote 5 (pp. 120-121); *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 225, footnote 59.

limitation. (See *Joplin Mercantile Co.* v. *United States*, 236 U. S. 531, 547, 548, for an instance of a conspiracy with manifold objects.)

Upon the same postulate, that it is the unlawful agreement to offend against the penal laws of the United States at which the statute is directed, this Court has decided, for example: that a single count in an indictment for conspiracy to commit two offenses is not bad for duplicity (*Frohwerk* v. *United States*, 249 U. S. 204, 209–210; *Ford* v. *United States*, 273 U. S. 593, 602);[50] that a conspiracy having as its object the commission of an offense denounced by the Bankruptcy Act is not in itself an offense arising under that Act and therefore not subject to the one-year statute of limitations prescribed thereby (*United States* v. *Rabinowich*, 238 U. S. 78; see *United States* v. *Hirsch*, 100 U. S. 33, 34, 35, and *United States* v. *McElvain*, 272 U. S. 633, 638, holding that conspiracies having as their objects the violation of the internal revenue laws are not offenses "arising" under those laws and hence not within a statute of limitations applicable to those offenses);[51] that the conspiracy

[50] *United States* v. *Manton*, 107 F. (2d) 834, 839 (C. C. A. 2), certiorari denied, 309 U. S. 664.

[51] *United States* v. *Kapp*, 302 U. S. 214, 216, is not, we submit, to the contrary. In that case it was held that within the meaning of the Criminal Appeals Act an indictment for conspiracy, under Section 37 of the Criminal Code, to commit a substantive offense, may be treated as founded on the statute at the violation of which the conspiracy is aimed. Obviously, unless such a holding were made, the

must be sufficiently charged and cannot be aided by averments of acts done by one or more of the conspirators in furtherance of the objects of the conspiracy (*United States* v. *Britton*, 108 U. S. 199, 205; *Pettibone* v. *United States*, 148 U. S. 197, 203; *Pierce* v. *United States*, 252 U. S. 239, 244); that in an indictment for conspiracy the same degree of detail is not required in stating the object of the conspiracy as if the indictment were one charging the substantive offense (*Williamson* v. *United States*, 207 U. S. 425, 447–448; *Crawford* v. *United States*, 212 U. S. 183, 191–192; *Joplin Mercantile Co.* v. *United States*, 236 U. S. 531, 548–549; *Frohwerk* v. *United States*, 249 U. S. 204, 209; *Thornton* v. *United States*, 271 U. S. 414, 423; *Wong Tai* v. *United States*, 273 U. S. 77, 81; *Glasser* v. *United States*, 315 U. S. 60, 66); that it is within the power of Congress to provide a more severe punishment for persons convicted of conspiracy to do a particular act than that provided for persons committing such act (*Cline* v. *United States*, 159 U. S. 590, 595; *United States* v. *Stevenson* (*No. 2*), 215 U. S. 201, 203); that "if the conspiracy was entered into within the limits of the United States and the jurisdiction of the court, the crime was then complete,

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Government would have no right of appeal in a conspiracy case under the Criminal Appeals Act when, in sustaining a demurrer, motion to quash or motion in arrest of judgment, the district court's decision is wholly predicated upon the validity or construction of the statute defining the substantive offense.

and the subsequent overt act in pursuance thereof may have been done anywhere" (*Dealy* v. *United States*, 152 U. S. 539, 547); that a person is not twice put in jeopardy by reason of the fact that after being convicted by a court martial of conspiracy to defraud the United States and also of the causing of false and fraudulent claims to be made against the United States, the sentence imposed upon him is greater than the court martial could inflict on conviction of either of the offenses charged, taken singly, since each is a distinct offense although growing out of the same transaction (*Carter* v. *McClaughry*, 183 U. S. 365, 390–395); that the contemplated offense need not be itself punishable through a criminal prosecution but only through suit for a penalty (*United States* v. *Hutto*, No. 1, 256 U. S. 524, 528–529); that one who, without more, furnishes supplies to an illicit distiller is not guilty of conspiracy even though the seller may have furthered the object of the conspiracy to which the distiller was a party but of which the supplier had no knowledge (*United States* v. *Falcone*, 311 U. S. 205, 210–211).[52]

If, as is made manifest by the decisions of this Court, the real offense under Section 37 is the agreement for concerted criminal action it must

[52] In view of the numerous decisions by this Court it would seem unnecessary to discuss the multitude of decisions in the lower federal courts which, although not passing upon the precise question here presented in deciding the problems involved, are predicated upon the premise that the heart of the offense under Section 37 is the conspiracy.

be evident that a single such agreement constitutes but one offense, regardless of how many criminal objects it may have had in contemplation. As was said by this Court in *Frohwerk* v. *United States*, 249 U. S. 204, 210, "The conspiracy is the crime, and that is one, however diverse its objects."[53] Consequently, if there be established one of the criminal objects charged it can serve no purpose, from the standpoint of punishment, to determine, through application of the test of identity of offenses stated in *Blockburger* v. *United States*, *supra*, whether that object is the same or different in its elements from some other object which may have been within the conspirators' contemplation.[54] It must also be apparent that whether there is one or more conspiracies in law in a given case must depend upon whether there is one or more conspiracies in fact. The instant case was tried and punishment was imposed and sustained upon the basis that there was but one conspiracy in fact. One conspiracy being but one offense, Section 37 authorizes punishment which may not exceed, in

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[53] See also *United States* v. *Manton*, 107 Fed. (2d) 834, 838 (C. C. A. 2), certiorari denied, 309 U. S. 664; *Harvey* v. *United States*, 23 F. (2d) 561, 564 (C. C. A. 2).

[54] Indeed, it is well established that only one of the criminal objects alleged need be proved. *Kepl* v. *United States*, 299 Fed. 590, 591 (C. C. A. 9); *McDonnell* v. *United States*, 19 F. (2d) 801, 803 (C. C. A. 1), certiorari denied, 275 U. S. 551; *United States* v. *Baker*, 61 F. (2d) 469, 470 (C. C. A. 2); *McWhorter* v. *United States*, 62 F. (2d) 829, 830 (C. C. A. 5).

maximum, imprisonment for two years and a fine of $10,000. Petitioners' sentences of eight years therefore exceeded those permitted by the statute by six years.

D. THE CORRECTLY REASONED DECISIONS IN THE LOWER FEDERAL COURTS RECOGNIZE THAT THE HEART OF THE OFFENSE UNDER SECTION 37 IS THE UNLAWFUL AGREEMENT AND THAT SUCH AN AGREEMENT CONSTITUTES BUT A SINGLE OFFENSE HOWEVER DIVERSE MAY BE ITS CRIMINAL OBJECTS

The view that petitioners' sentences may not stand has the support of the authorities in the lower federal courts which, we submit, proceed on correct reasoning in passing upon the question of punishment for conspiracy or the analogous question of double jeopardy.

In *United States* v. *Anderson*, 101 F. (2d) 325 (C.C.A. 7), certiorari denied, 307 U. S. 625, two indictments were returned against the defendants, one charging a continuing conspiracy under Section 37 of the Criminal Code, to obstruct and retard the passage of the United States mails, in violation of Section 201 of the Criminal Code, and the other in two counts charging a conspiracy in violation of Section 1 of the Sherman Act, to obstruct the transportation in interstate and foreign commerce of passengers and freight, including coal, the charges arising out of labor difficulties in connection with certain mines in Illinois. On each indictment each defendant was sentenced to the maximum punishment permitted by the conspiracy statute upon which the indictment was founded, the

sentences to run consecutively. On appeal, the Circuit Court of Appeals for the Seventh Circuit held (p. 333) that the consecutive punishments could not stand because there was but one conspiracy having as its objects not only the stoppage of transportation of coal but also interference with the transportation of the mails. Relying upon the statement of this Court in the *Frohwerk* case, *supra*, that "The conspiracy is the crime, and that is one, however diverse its objects,"[55] the court said (p. 333) that "we can not believe that Congress intended to permit the accumulation of sentences upon diverse objects of a conspiracy where there was but one conspiracy * * *." The court also relied upon its prior decisions in *Miller* v. *United States*, 4 F. (2d) 228, certiorari denied, 268 U. S. 692; and *Murphy* v. *United States*, 285 Fed. 801.

[55] The court thought that this statement of the Court may have been dictum, albeit sound as applied to the facts of the case before it. The supplemental brief for Frohwerk in this Court (No. 685, October Term, 1918) makes, however, the contention (p. 13) "that the first count of the indictment is duplicitous". The first count of the indictment was the conspiracy count, and it alleged (R. 4) that the objects of the conspiracy were to cause insubordination, disloyalty, mutiny and refusal of duty in the military and naval forces of the United States, and to obstruct the recruiting and enlistment services of the United States to the injury thereof, and of the United States, while the Government was at war with Germany, each of which objects constituted a separate offense under Section 3, Title I, of the Espionage Act of June 15, 1917, c. 30, 40 Stat. 217, 219, 50 U. S. C. 33.

In the *Miller* case, 4 F. (2d) 228, that defendant, with others, was charged in one count with conspiring to transport unlawfully spirits removed from a bonded warehouse, and in a second count with conspiring to remove spirits from a bonded warehouse. He was sentenced to imprisonment for two years and to pay a $10,000 fine on the first conspiracy count; on the second, he was sentenced to imprisonment for two years and to pay a fine of $5,000, the terms of imprisonment to be served consecutively. After stating (4 F. (2d) at p. 231) that "there is nothing in the evidence which warrants the conclusion that there were here two separate conspiracies—one for Miller to transport industrial alcohol, and the other for Miller to aid and abet in the removal from the warehouse of the alcohol. We would be compelled to go far afield to gather from this record proof of more than a single conspiracy, even though in effecting its purpose a plurality of substantive and severally punishable offenses may have been committed," the Circuit Court of Appeals for the Seventh Circuit held that "Since the evidence warrants the conclusion that there was a conspiracy wherein Miller would aid in the general purpose of removing alcohol, * * * and does not show a separate conspiracy to transport the alcohol after its removal" (p. 231), the sentence on count 1 could not be sustained. It said that "a single conspiracy, if covering the entire transaction, may not be split up into a plurality of

offenses" (p. 230). The court accordingly modified the judgment by striking out the sentence on the first count (p. 232), that alleging a conspiracy to transport the alcohol.

In the *Murphy* case, 285 Fed. 801, there arose the question whether Murphy could be lawfully sentenced upon two counts of an indictment, one of which charged him and others with conspiring to rob the mails, and the other with a conspiracy to have in their possession and to conceal the mail bags and proceeds thereof, secured through robbery, as charged in the previous count. The maximum sentence under the conspiracy statute had been imposed upon each count. In reaching the conclusion that Murphy could not be so punished because of the Fifth Amendment, which "protects all against double punishment for the same offense," the court, on petition for rehearing, said (p. 817):

> We are not so much interested in the difference, if any, between the commonly called substantive crimes (robbery and having and concealing goods secured through robbery) as we are in the so-called conspiracy offenses. That they are distinct and different offenses must, of course, be conceded. But, upon the facts in this case, is there justification for our reaching a different conclusion, because dealing with alleged conspiracies, instead of the substantive crimes which were the object of the conspiracies? The precise question is: Can a conviction,

> based upon two conspiracy charges, one charging the defendants with a conspiracy to rob, the other charging them with a conspiracy to have and to conceal the property thus secured through robbery, be maintained? Indeed, the issue may be still further narrowed. *Upon the evidence in this case,* can the conviction on these two counts be sustained? * * * [Italics the court's.]
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> * * * * * *
>
> It may be admitted that separate conspiracies may be thus formed, to effectuate which different plans involving perhaps different conspirators are formulated. We need not decide any such imaginary case, but content ourselves with a decision applicable to the facts in this case. The evidence leaves no room for legitimate discussion. It conclusively establishes but one conspiracy. There was no separate conspiracy to have and to conceal the stolen property, and no evidence tending to show such separate combination.

The court accordingly modified Murphy's sentences by striking out the sentence imposed on the count charging conspiracy to conceal the goods secured through the robbery (pp. 817–818).

In *Powe* v. *United States*, 11 F. (2d) 598, an indictment was returned against Powe, Jemison and others, charging them with a continuing conspiracy in Mobile, Alabama, covering the period between January 1, 1922, and November, 1923, to sell intoxicating liquor to the general public. The indictment alleged that the conspiracy contem-

plated more than one offense of the character described. Powe was acquitted on this indictment. A later indictment against Powe and Jemison charged in one of its counts a continuing conspiracy in the Southern District of Alabama, extending from January 1, 1923, to January 17, 1925, to sell, barter, deal in, furnish, possess, and deliver intoxicating liquor. The question presented was whether the trial court erred in refusing to sustain a plea of *autrefois acquit* based on the earlier indictment. The Circuit Court of Appeals for the Fifth Circuit, in reciting the facts, pointed to the testimony of Jemison that there was one general continuing conspiracy between him and a number of other defendants, including Powe, to commit a number of offenses, but that there was no separate conspiracy to commit a single offense, and that the period covered by the conspiracy extended back as far as 1921, and continued until November, 1923. The Circuit Court of Appeals, reversing the District Court, held that Powe's plea of *autrefois acquit* should have been sustained, saying (p. 599) that "The government cannot split up one conspiracy and make several conspiracies out of it."[*]

[*] In a later case in the same circuit, *Bertsch* v. *Snook*, 36 F. (2d) 155, the question whether the appellant had been subjected to double punishment arose solely upon the face of the indictment, in a habeas corpus proceeding. There was no other evidence before the court. The first count of the indictment charged the appellant with having conspired with others "to assault any persons having charge, control or custody of any mail matter * * * also to rob, steal

In *United States* v. *Mazzochi*, 75 F. (2d) 497, there were two conspiracy counts identical in every respect except as to the narcotic drugs sold and the buyers. Consecutive maximum sentences were imposed. The Circuit Court of Appeals for the Second Circuit, in a *per curiam* opinion, held that "it would be preposterous to argue that, if several per-

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and purloin the mail matter, including letters, packages and pouches, containing such matter, * * * and to receive, secrete, conceal, unlawfully have in their possession and destroy such mail matter." The second count charged the same defendants with conspiracy "to rob, steal and purloin any mail bag, * * * to convey away such mail bags to the hindrance and detriment of the public service, to appropriate the same to their own use, and to tear, cut and otherwise injure the said mail bags with intent to rob and steal any mail contained therein." Upon plea of guilty the trial court imposed a sentence of two years on each count, the maximum, to run consecutively. The Circuit Court of Appeals held that there was but one offense and ordered the prisoner's discharge after he had served two years. The court appropriately pointed out that the prisoner had been subjected to the maximum imprisonment authorized for a single conspiracy by Section 37 of the Criminal Code and that it followed that if the two conspiracy counts to which he pleaded guilty charged the same offense, it was error to have refused to order his discharge from further imprisonment (p. 156). But the court reasoned that but one offense was charged because the second count, viewed in the light of the contemplated substantive offenses, included, element for element, everything that was charged in the first count. While the court thus proceeded by what we conceive to be an erroneous process of rationalization, it would seem that it might appropriately have held that in fact, and therefore in law, there was but one conspiracy since it appeared that each count grew out of the same mail robbery.

sons combine to sell drugs generally, that single venture breaks up into as many separate ventures as there chance to be sales. The sales are the conclusion and the fruit of the original plan, the very reason for its being; they may be multiform, but the plan is single" (p. 498). The court accordingly reduced the sentence to the maximum for a single count.

In *Short v. United States*, 91 F. (2d) 614 (C. C. A. 4), the question presented was whether pleas of former jeopardy should have been sustained as to two of the appellants, Nebbs and Fentress. They were charged with conspiring in the Eastern District of Virginia continuously from December, 1933, to July, 1936, to violate several sections of the internal revenue laws relating to liquor, including R. S. 3450. Some of the overt acts were alleged to have been committed in the Eastern District of North Carolina. The pleas of former jeopardy were based upon two conspiracy indictments in the Eastern District of North Carolina, one against Nebbs, to which he pleaded guilty, and one against Fentress, upon which he was acquitted. Each of these indictments covered a portion of the period referred to in the later indictment, but there were differences between the earlier and the later indictments in the places charged as the places of conspiring, the persons named as conspirators, and the overt acts. The earlier indictments also did not name R. S. 3450 as one of the statutes which the conspirators contemplated violating.

The Circuit Court of Appeals for the Fourth Circuit, in an opinion by Judge Parker, held that the pleas of former jeopardy should have been submitted to the jury, pointing out that as to Nebbs there was evidence introduced at the trial of the case at bar which gave ground for a reasonable inference that for the overlapping period covered by both indictments against him those indictments related to the same conspiracy, and that as to Fentress there were circumstances brought out at the trial of the later indictment which indicated that he could have been convicted under the earlier indictment, and also that the differences between the two indictments and the generality of the language employed made it impossible to say as a matter of law upon the face of the indictments whether they related to the same conspiracy. The court considered at length the various differences between the indictments which the Government stressed and its treatment of those differences well illustrates the Government's position herein, that the determining factor in each case is whether there is in fact but one conspiracy. It would unduly extend this brief to review fully the court's discussion but, concerning the fact that the indictment at bar, as contrasted with the North Carolina indictments, alleged that an object of the conspiracy was the violation of R. S. 3450, the court said (p. 622):

> The crime charged in the North Carolina indictments, as well as in the indictment

before us, is conspiracy to manufacture, remove, and conceal distilled spirits in violation of the internal revenue laws, not the specific violation of those laws which are the objects of the conspiracy. Such a conspiracy is a single crime, even though it may contemplate the doing of acts which will violate a number of statutes; and it cannot be split up into a number of offenses by charging, in different indictments the violation of different ones of these statutes as objects of the conspiracy. To permit this would be, not only to permit the same conspiracy to be prosecuted a number of times in violation of the rule against double jeopardy; but also to permit the punishment prescribed by Congress to be increased without authority of law. When a conspiracy has been once prosecuted, therefore, the rule against double jeopardy forbids that it be prosecuted again under an indictment which merely adds allegations as to its objects, as that the violation of an additional statute was contemplated by it.

It is to be noted that the rule in case of prosecution for conspiracy to violate statutes is different from the rule applicable in prosecutions for violation of the statutes themselves. In the latter case, in the absence of circumstances giving rise to the doctrine of merger, there may be a separate prosecution for each of the statutes violated without any splitting of offenses; for each of the statutory crimes involves a different element.

> In the case of conspiracy, however, the gist of the crime is the unlawful agreement, or partnership in criminal purposes thereby created; and one conspiracy does not become several because it may incidentally involve the violation of several statutes. * * *

In support of its conclusion the court cited, among others, the *Murphy* and *Powe* decisions (pp. 622–624).

In *Ex parte Rose*, 33 F. Supp. 941 (W. D. Mo), the court was able, on habeas corpus, to determine from the face of the indictment that the two counts thereof, each alleging a conspiracy, charged but a single conspiracy, the only difference between them being that each alleged that the conspirators contemplated the violation of a different section of the internal revenue laws relative to liquor. On the basis of the *Miller*, *Powe*, *Anderson* and *Short* cases the court held that the petitioner could not be required to serve more than the maximum of two years permitted by the conspiracy statute. A similar ruling was made on habeas corpus in *Sprague* v. *Aderholt*, 45 F. (2d) 790 (N. D. Ga.). See also *People* v. *Silverman*, 281 N. Y. 457 (Ct. of App.).[37] Other cases illustrative of the correct ap-

[37] In *United States* v. *Brimsdon*, 23 F. Supp. 510 (W. D. Mo.), which arose on a plea in abatement, it was held that an indictment charging a conspiracy to injure voters in the fifteenth precinct of the twelfth ward in a certain city in the exercise of their right to vote at a certain congressional election did not charge the same offense as an indictment alleging a conspiracy to so injure voters in the fifth precinct

proach in determining whether there exists more than one conspiracy, *i. e.*, the determination of how many conspiracies there are in fact, are *Gebardi* v. *United States*, 57 F. (2d) 617, 619 (C. C. A. 7),[38] and *Watkins* v. *Zerbst*, 85 F. (2d) 999 (C. C. A. 10).

E. THE DENIAL OF CERTIORARI BY THIS COURT IN THE *FLEISHER* CASE DOES NOT GIVE SUPPORT TO THE DECISION BELOW

This Court's disposition of the petition for a writ of ceritorari to review the decision of the court below in *Fleisher* v. *United States*, 91 F. (2d) 404, *supra*, lends no real strength to that court's decision in the instant case. In the *Fleisher* case

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of the twelfth ward in the same city. The contention was that the evidence at the trial of the former indictment tended to prove that the defendant was a party to a conspiracy to injure voters in the twelfth ward generally. The court said that the difficulty with the argument was that the earlier indictment did not so charge: "It charged only a conspiracy to injure certain citizens, as fully described as if they (were) named, whereas the indictment in this case charges a conspiracy to injure and oppress certain other citizens, as fully described as if they were named" (p. 512). While it is difficult to follow the court's reasoning if the defendant's conception of the evidence at the trial of the first indictment was correct, it should be noted that the court did not in any wise disagree with the decisions in the *Short*, *Pouce*, *Miller* and *Murphy* cases, but thought those decisions were distingaishable (pp. 512–513).

[38] While this decision was reversed by this Court (287 U. S. 112), the reversal occurred because it could not agree with the court below that the woman could under the circumstances of the case be convicted with the man of conspiracy to violate the White Slave Act.

the court below, employing the same reasoning as it does in the present case, upheld cumulative sentences upon four counts of an indictment where each count charged a conspiracy identical as to duration, conspirators named and place of entry into the conspiracy, but differed from the other counts in the allegation of the internal revenue law to be violated.[59] This Court denied certiorari as to the contention that the cumulative sentences constituted double punishment, in violation of the Fifth Amendment, but granted certiorari as to another point (302 U. S. 218, 219, 673; cf. petion for writs of certiorari (p. 4) and supporting brief (p. 3) in Nos. 202, 203 and 204, 1937 Term).

However, as is apparent from the opinion of the court below in the *Fleisher* case (p. 406), that court did not have the evidence before it.[60] It consequently could not be ascertained whether the evidence established but one conspiracy in fact and the court was compelled to assume that, in accordance with the indictment, testimony was offered showing the existence of four separate conspiracies. Additionally, it could not be definitely determined from the face of the indict-

[59] The objective offenses were to possess unregistered distilling apparatus; to make and ferment mash in an unauthorized distillery; to carry on the business of distillers without giving bond; and to possess distilled spirits in unstamped containers.

[60] The appeal was prosecuted under Rule VIII of the Criminal Appeals Rules and therefore without a bill of exceptions.

ment that there was but one conspiracy [61] and it was not at all beyond the realm of possibility that there could have been four.[62] It is therefore evident that Fleisher did not, and could not without the evidence, establish his contention that there was one conspiracy. Under the circumstances the Circuit Court of Appeals correctly disposed of the case in upholding the cumulative sentences although, we submit, it employed erroneous reasoning in depending upon the distinctiveness of the substantive offenses alleged in the various counts of the indictment.[63] There was consequently no necessity for a review of the question of punishment by this Court.[64] In the instant case, however, the several counts of the indictment were conceded by the Government to charge the illegal objects of one continuing conspiracy, the case was submitted to the jury on that theory, the jury necessarily found that petitioners were each guilty of participating in the

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[61] The court below pointed out in its opinion that the period covered by the indictment was over twelve months and different overt acts were charged in each count.

[62] As the Government indicated in its brief in opposition (Nos. 202, 203, and 204, 1937 Term, p. 9) it is not uncommon for large illicit liquor operators to have independent organizations to perform various functions.

[63] The Government in its brief in opposition resorted to the same reasoning as the Circuit Court of Appeals (pp. 7–12), although it did, as stated, indicate the possibility that there could, in fact, have been four separate conspiracies (see preceding footnote).

[64] "The denial of a writ of certiorari imports no expression of opinion upon the merits of the case * * *." *United States* v. *Carver*, 260 U. S. 482, 490.

single conspiracy, and petitioners' eight year sentences were approved by the Circuit Court of Appeals, despite the existence of a single conspiracy, solely on the theory that such punishment would lie because of the distinctiveness of the offenses which were the objects of the conspiracy.

While, as a precautionary measure, it may possibly be of some aid to the prosecution to charge each of the illegal objects of a conspiracy in a separate count rather than in a single count,[65] the prosecutor cannot, of course, by so doing convert what is essentially a single conspiracy into multiple conspiracies for the purpose of punishment. As was said in *Murphy* v. *United States*, 285 Fed. 801, 817 (C. C. A. 7), "It is the evidence, and not the theory of the pleader, to which we must look to determine [the] issue" of double punishment. See also *Short* v. *United States*, 91 F. (2d) 614, 624 (C. C. A. 4). In each case the determination must be how many conspiracies there are in fact. The instant case does not involve the factual difficulty present in many cases (cf. *Schultz* v. *Hudspeth*, No. 6, present Term, now pending in this Court on motion for leave to proceed *in forma pauperis* and on petition for a writ of certiorari) of determining the number of conspiracies; the trial record requires the assumption that there was but one. Conse-

[65] *United States* v. *Anderson*, 101 F. (2d) 325, 333 (C. C. A. 7), certiorari denied, 307 U. S. 625; *Sprague* v. *Aderholt*, 45 F. (2d) 790, 791 (N. D. Ga.); see also *Dealy* v. *United States*, 152 U. S. 539, 542–543.

quently, petitioners for this single crime may be given no greater punishment than the maximum fixed by the statute, a fine of not more than $10,000, or imprisonment for not more than two years, or both (*supra*, p. 3). The Circuit Court of Appeals therefore erred in sustaining petitioners' sentences of imprisonment for eight years and a fine of $2,000. This Court has the power to correct the error by vacating the invalid portion of the sentences (the additional six years) or by remanding the cases to the district court for resentencing in accordance with the statute.[66]

II

The Six-Year Limitation Prescribed by the Second Paragraph of Section 3748 (a) of the Internal Revenue Code Applies to the Conspiracy Here Involved. Petitioner Wainer's Prosecution Was Consequently Not Barred

Petitioner Wainer alone contends that his prosecution was barred. He asserts that the proof shows

[66] *Blitz* v. *United States*, 153 U. S. 308, 318; *Fleisher* v. *United States*, 302 U. S. 218, 220; *Salazar* v. *United States*, 236 Fed. 541 (C. C. A. 8); *D'Allessandro* v. *United States*, 90 F. (2d) 640 (C. C. A. 3); *Spirou* v. *United States*, 24 F. (2d) 796 (C. C. A. 2), certiorari denied, 277 U. S. 596; *Priori* v. *United States*, 6 F. (2d) 575 (C. C. A. 6); *Jackson* v. *United States*, 102 Fed. 473 (C. C. A. 9); see also the *Miller*, *Murphy* and *Mazzochi* cases, *supra*.

A new trial would not be required, of course, since under the theory upon which the Government proceeded and the case was submitted to the jury, that body necessarily found petitioners guilty of participating in a single continuing conspiracy.

that he affirmatively withdrew from the conspiracy more than three years (but not more than six years) prior to the returning of the indictment on December 19, 1939 (Br. 2–3, 4, 5, 10–12).[87]

The second paragraph of Section 3748 (a) of the Internal Revenue Code provides in part that "For offenses arising under section 37 of the Criminal Code, March 4, 1909, 35 Stat. 1096 (U. S. C., Title 18, § 88), where the object of the conspiracy is to attempt in any manner to evade or defeat any tax or the payment thereof, the period of limitation shall also be six years."[88] This paragraph and the second and third exceptions in the first paragraph

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[87] In view of the similarity of their situations (see opinion below, R. 612), it has been assumed that petitioner Braverman's requested instructions (8, 9, and 10, R. 32) and his motion for a directed verdict made at the close of the Government's case (R. 422–423, 425), which were joined in by petitioner Walker (R. 425, 589), are sufficient to raise the limitation question as to him, although the requested instructions and the motion were predicated upon evidence relating to petitioner Braverman only.

[88] The section in its entirety, except for matter not pertinent, reads:

> PERIODS OF LIMITATION.
>
> (a) CRIMINAL PROSECUTIONS.—No person shall be prosecuted, tried, or punished, for any of the various offenses arising under the internal revenue laws of the United States unless the indictment is found or the information instituted within three years next after the commission of the offense, except that the period of limitation shall be six years—
>
> (1) for offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner,

were first enacted in 1932 (Revenue Act of June 6, 1932, c. 209, Sec. 1108, 47 Stat. 169, 288). Prior to that this Court had held that a conspiracy having as its object the violation of an internal revenue law was a distinct offense from the objective offense and hence was not within the section. It therefore fell within the general three-year limitation provision relating to criminal offenses. (See *United States* v. *McElvain*, 272 U. S. 633, 638; *United States* v. *Hirsch*, 100 U. S. 33, 34, 35; *United States* v. *Rabinowich*, 238 U. S. 78, 88–89.) This Court had also held that the first exception in the first paragraph, providing a six-year limitation period as to offenses involving the defrauding or attempting to defraud the United States, did not apply to an attempt to evade or defeat taxes, since the defrauding of the Government is not made an essential ingredient of the latter offense (*United*

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(2) for the offense of willfully attempting in any manner to evade or defeat any tax or the payment thereof, and

(3) for the offense of willfully aiding or assisting in, or procuring, counseling, or advising, the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a false or fraudulent return, affidavit, claim, or document (whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document).

For offenses arising under section 37 of the Criminal Code, March 4, 1909, 35 Stat. 1096 (U. S. C., Title 18, § 88), where the object of the conspiracy is to attempt in any manner to evade or defeat any tax or the payment thereof, the period of limitation shall also be six years.

States v. Scharton, 285 U. S. 518). The result of these decisions was that attempts to evade or defeat taxes where the defrauding of the Government was not an essential element, and conspiracies to accomplish these objects, were required to be prosecuted within three years. It was to overcome the effect of these decisions, by permitting a six-year period for the prosecution of these offenses, that the second exception in the first paragraph and the second paragraph were added. See House Report No. 1492 on the Revenue Bill of 1932, p. 29, 72nd Cong., 1st sess.

There is consequently no necessity, as petitioner seems to indicate (Br. 10), that a conspiracy, to be within the second paragraph, must have as its object the commission of an offense in which defrauding or attempting to defraud the United States is an element.[6] Also, it is obvious, despite petitioner's insistence to the contrary (Br. 11), that the conspiracy charged in the instant indictment had as its objects the violation of provisions of the internal revenue laws designed to prevent the evasion or defeating of taxes. (See summary of the counts of the indictment at pp. 4–5, *supra*.) The six-year limitation period prescribed in the second paragraph of the section is therefore applicable, with the result that the prosecution of petitioner Wainer was not barred.

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[6] The offenses enumerated in two of the counts of the indictment certainly have as an element the attempted defrauding of the Government. (See Counts 4 and 5, *supra*, p. 4.)

III

Petitioner Wainer Is Not Now in a Position to Urge That the Trial Court Should Have Sustained His Plea of Former Jeopardy. If His Contention May Be Considered, That Court Was Not Made Aware of Any Facts Which Would Have Justified It in Concluding That There Was Substance to the Plea

Petitioner Wainer urges (Br. 4, 5, 12–13) that the trial court should have sustained his plea of former jeopardy (R. 432–438). He relies for jeopardy upon an indictment returned against him at the November Term, 1936, in the United States District Court for the Northern District of Illinois, Eastern Division, to which he pleaded guilty and as to which he served a sentence of two years and six months. That indictment and the instant indictment, he states, charged him with conspiring to violate the same laws at Chicago during the same time (Br. 12).[70]

We submit that petitioner Wainer is in no position now to urge that the rejection of his plea of former jeopardy constituted reversible error. The indictment in the Northern District of Illinois was marked as Exhibit "B" to his plea (R. 433) but is not printed in the record and evidently was not

[70] The plea of former jeopardy, as set forth in the record, makes reference to another indictment in the Southern District of Illinois (R. 433), but petitioner Wainer makes no mention of that indictment in his brief in this Court and therefore apparently does not rely upon it.

certified to the Circuit Court of Appeals as one of the original exhibits (R. 602–603). This was undoubtedly because the plea's rejection was not assigned as error (R. 40–43, 595–601). The point is not briefed in the appellants' brief in the Circuit Court of Appeals; that court did not pass upon the question (R. 607–614); and no complaint is made in the petition for rehearing in that court filed on behalf of petitioner Wainer [11] as to the failure of the court to do so. Since the Illinois indictment is not contained in the record this Court is afforded no opportunity for determining whether the two indictments charged the same conspiracy. *Cf. Ex Parte Hull*, 312 U. S. 546, 551.

Moreover, it is apparent from the colloquy attending the denial of the plea that petitioner's counsel was unable to advise the trial court that the Illinois indictment related to any of the transactions involved in the present case (R. 434, 435).[12]

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[11] See copy of this petition appearing in the transcript of record filed with the petition for a writ of certiorari, pp. 699–702.

[12] We have obtained through the United States Attorney who conducted the prosecution in this case a certified copy of the plea of former jeopardy and have lodged it with the Clerk of this Court. The tenth count of Exhibit "B" is the conspiracy count upon which petitioner relies. The only resemblance that count bears to the present indictment is that petitioner Braverman was also named as a conspirator, that it covers a portion of the period of time recited in the later indictment, that the locale of operations was in part in Chicago, and that violations of some of the same penal laws are alleged to have been the objects of the conspiracy. In every other respect the two indictments are dissimilar.

CONCLUSION

For the reasons stated, it is respectfully submitted that the sentences of petitioners should be modified through the elimination by this Court of the invalid six-year portion thereof, or the cases should be remanded to the district court for resentencing in accordance with law.[73] In all other respects the judgment of the Circuit Court of Appeals should be affirmed.

CHARLES FAHY,
Solicitor General.

W. MARVIN SMITH,
Attorney.

OCTOBER 1942.

Indeed, the details alleged in the Illinois indictment would seem to lead inevitably to the conclusion that, as the district court indicated, that indictment dealt with a different conspiracy than that charged in the instant case. The burden was, of course, upon petitioner Wainer to establish that the two indictments charged the same conspiracy. It is significant that petitioner Braverman, who was named as a conspirator in both indictments, did not raise the question of former jeopardy.

[73] If the Government's position with reference to petitioners' sentences is sustained by this Court its decision will be immediately called to the attention of the Pardon Attorney in this Department for action in connection with the similar sentence of the third appellant in the court below, Morris Frank (R. 45, 608, 613), who did not petition for a writ of certiorari. The Pardon Attorney will also be requested to inquire into the sentences of the other defendants who were convicted upon or pleaded guilty to the indictment in the instant case.

U. S. GOVERNMENT PRINTING OFFICE 1942

P. 2

SUPREME COURT OF THE UNITED STATES.

Nos. 43, 44.—October Term, 1942.

Harry Braverman, Petitioner,
43 vs.
The United States of America.

Allen Wainer, Petitioner,
44 vs.
The United States of America.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[November 9, 1942.]

Mr. Chief Justice Stone delivered the opinion of the Court.

The questions for decision are: (1) Whether a conviction upon the several counts of an indictment, each charging conspiracy to violate a different provision of the Internal Revenue laws, where the jury's verdict is supported by evidence of but a single conspiracy, will sustain a sentence of more than two years' imprisonment, the maximum penalty for a single violation of the conspiracy statute, and (2) whether the six-year period of limitation prescribed by § 3748(a) of the Internal Revenue Code is applicable to offenses arising under § 37 of the Criminal Code, 18 U. S. C. 88 (the conspiracy statute), where the object of the conspiracy is to evade or defeat the payment of a federal tax.

Petitioners were indicted, with others, on seven counts, each charging a conspiracy to violate a separate and distinct internal revenue law of the United States.[1] On the trial there was evi-

[1] The seven counts respectively charged them with conspiracy, in violation of § 37 of the Criminal Code, unlawfully (1) to carry on the business of wholesale and retail liquor dealers without having the special occupational tax stamps required by statute, 26 U. S. C. § 3253; (2) to possess distilled spirits, the immediate containers of which did not have stamps affixed denoting the quantity of the distilled spirits which they contained and evidencing payment of all Internal Revenue taxes imposed on such spirits, 26 U. S. C. § 2803; (3) to transport quantities of distilled spirits, the immediate containers of which did not have affixed the required stamps, 26 U. S. C. § 2803; (4) to carry on the business of distillers without having given bond as required by law, 26 U. S. C. § 2833; (5) to remove, deposit and conceal distilled spirits in respect whereof a tax is imposed by law, with intent to defraud the United States of such tax, 26 U. S. C. § 3321; (6) to possess unregistered stills and distilling apparatus, 26 U. S. C. § 2810; and (7) to make and ferment mash, fit for distillation, on unauthorized premises, 26 U. S. C. § 2834.

dence from which the jury could have found that for a considerable period of time petitioners, with others, collaborated in the illicit manufacture, transportation, and distribution of distilled spirits involving the violations of statute mentioned in the several counts of the indictment. At the close of the trial petitioners renewed a motion which they had made at its beginning to require the Government to elect one of the seven counts of the indictment upon which to proceed, contending that the proof could not and did not establish more than one agreement. In response the Government's attorney took the position that the seven counts of the indictment charged as distinct offenses the several illegal objects of one continuing conspiracy, that if the jury found such a conspiracy it might find the defendants guilty of as many offenses as it had illegal objects, and that for each such offense the two-year statutory penalty could be imposed.

The trial judge submitted the case to the jury on that theory. The jury returned a general verdict finding petitioners "guilty as charged", and the court sentenced each to eight years' imprisonment. On appeal the Court of Appeals for the Sixth Circuit affirmed, 125 F. 2d 283; on the authority of its earlier decisions in *Fleisher* v. *United States*, 91 F. 2d 404 and *Meyers* v. *United States*, 94 F. 2d 433. It found that "From the evidence may be readily deduced a common design of appellants and others, followed by concerted action to commit the several unlawful acts specified in the several counts of the indictment." It concluded that the fact that the conspiracy was "a general one to violate all laws repressive of its consummation does not gainsay the separate identity of each of the several conspiracies". We granted certiorari, 316 U. S. 653, to resolve an asserted conflict of decisions.[2] The Government, in its argument here, submitted the case for our decision with the suggestion that the decision below is erroneous.

Both courts below recognized that a single agreement to commit an offense does not become several conspiracies because it continues over a period of time, see *United States* v. *Kissel*, 218 U. S. 601, 607; cf. *In re Snow*, 120 U. S. 274, 281-3, and that there

[2] Compare the decision below and those in Beddow v. United States, 70 F. 2d 674, 676 (C. C. A. 8th); Yamaichi Ito v. United States, 64 F. 2d 75, 77 (C. C. A. 9th); and Olmstead v. United States, 19 F. 2d 842, 847 (C. C. A. 9th), with those in United States v. Mazzochi, 75 F. 2d 497, 498 (C. C. A. 2nd); Short v. United States, 91 F. 2d 614, 622 (C. C. A. 4th); Powe v. United States, 11 F. 2d 598, 599 (C. C. A. 5th); and United States v. Anderson, 101 F. 2d 325, 333 (C. C. A. 7th).

may be such a single continuing agreement to commit several offenses. But they thought that in the latter case each contemplated offense renders the agreement punishable as a separate conspiracy.

The question whether a single agreement to commit acts in violation of several penal statutes is to be punished as one or several conspiracies is raised on the present record, not by the construction of the indictment, but by the Government's concession at the trial and here, reflected in the charge to the jury, that only a single agreement to commit the offenses alleged was proven. Where each of the counts of an indictment alleges a conspiracy to violate a different penal statute it may be proper to conclude, in the absence of a bill of exceptions bringing up the evidence, that several conspiracies are charged rather than one, and that the conviction is for each. See *Fleisher* v. *United States*, *supra*; *Shultz* v. *Hudspeth*, 123 F. 2d 729, 730. But it is a different matter to hold, as the court below appears to have done in this case and in *Meyers* v. *United States*, *supra*, that even though a single agreement is entered into, the conspirators are guilty of as many offenses as the agreement has criminal objects.

The gist of the crime of conspiracy as defined by the statute is the agreement or confederation of the conspirators to commit one or more unlawful acts "where one or more of such parties do any act to effect the object of the conspiracy". The overt act, without proof of which a charge of conspiracy cannot be submitted to the jury, may be that of only a single one of the conspirators and need not be itself a crime. *Bannon and Mulkey* v. *United States*, 156 U. S. 464, 468-9; *Joplin Mercantile Co.* v. *United States*, 236 U. S. 531, 535, 536; *United States* v. *Rabinowich*, 238 U. S. 78, 86; *Pierce* v. *United States*, 252 U. S. 239, 244. But it is unimportant, for present purposes, whether we regard the overt act as a part of the crime which the statute defines and makes punishable, see *Hyde* v. *United States*, 225 U. S. 347, 357-9, or as something apart from it, either an indispensable mode of corroborating the existence of the conspiracy or a device for affording a *locus poenitentiae*, see *United States* v. *Britton*, 108 U. S. 193, 204, 205; *Dealy* v. *United States*, 152 U. S. 539, 543, 547; *Bannon and Mulkey* v. *United States*, *supra*, 469; *Hyde* v. *Shine*, 199 U. S. 62, 76; *Hyde* v. *United States*, *supra*, 388; *Joplin Mercantile Co.* v. *United States*, *supra*.

For when a single agreement to commit one or more substantive crimes is evidenced by an overt act, as the statute requires, the

precise nature and extent of the conspiracy must be determined by reference to the agreement which embraces and defines its objects. Whether the object of a single agreement is to commit one or many crimes, it is in either case that agreement which constitutes the conspiracy which the statute punishes. The one agreement cannot be taken to be several agreements and hence several conspiracies because it envisages the violation of several statutes rather than one.

The allegation in a single count of a conspiracy to commit several crimes is not duplicitous, for "The conspiracy is the crime and that is one however diverse its objects". *Frohwerk* v. *United States*, 249 U. S. 204, 210; *Ford* v. *United States*, 273 U. S. 593, 602; *United States* v. *Manton*, 107 F. 2d 834, 838. A conspiracy is not the commission of the crime which it contemplates, and neither violates nor "arises under" the statute whose violation is its object. *United States* v. *Rabinowich*, *supra*, 87-9; *United States* v. *McElvain*, 272 U. S. 633, 638; see *United States* v. *Hirsch*, 100 U. S. 33, 34, 35. Since the single continuing agreement, which is the conspiracy here, thus embraces its criminal objects, it differs from successive acts which violate a single penal statute and from a single act which violates two statutes. See *Blockburger* v. *United States*, 284 U. S. 299, 301-4; *Albrecht* v. *United States*, 273 U. S. 1, 11-12. The single agreement is the prohibited conspiracy, and however diverse its objects it violates but a single statute, § 37 of the Criminal Code. For such a violation only the single penalty prescribed by the statute can be imposed.

Petitioner Wainer contends that his prosecution was barred by the three-year statute of limitations, 18 U. S. C. § 582, since he withdrew from the conspiracy more than three although not more than six years before his indictment. This Court, in *United States* v. *McElvain*, 272 U. S. 633, 638, and *United States* v. *Scharton*, 285 U. S. 518, held that the three-year statute of limitations applicable generally to criminal offenses barred prosecution for a conspiracy to violate the Revenue Acts, since it was not within the exception created by the Act of November 17, 1921, 42 Stat. 220, now § 3748(a)(1) of the Internal Revenue Code, which provided a six-year statute of limitations "for offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not". To overcome the effect of these decisions, that Act was amended, Revenue Act

of 1932, 47 Stat. 169, 288, by the addition of a second exception, which provided a six-year statute of limitations "for the offense of willfully attempting in any manner to evade or defeat any tax or the payment thereof", and by the addition of a new paragraph, reading as follows:

"For offenses arising under section 37 of the Criminal Code, where the object of the conspiracy is to attempt in any manner to evade or defeat any tax or the payment thereof, the period of limitation shall also be six years."

To be within this last paragraph it is not necessary that the conspiracy have as its object the commission of an offense in which defrauding or attempting to defraud the United States is an element. It is enough that the conspiracy involves an attempt to evade or defeat the payment of federal taxes, which was among the objects of the conspiracy of which petitioner was convicted. Enlargement, to six years, of the time for prosecution of such conspiracies was the expressed purpose of the amendment. See H. R. Rep. No. 1492, 72d Cong., 1st Sess., 29.

We do not pass upon petitioner Wainer's argument that his plea of former jeopardy should have been sustained, since the earlier indictment to which he pleaded guilty and which he insists charged the same offense as that of which he has now been convicted, is not a part of the record.

The judgment of conviction will be reversed and the cause remanded to the district court where the petitioners will be resentenced in conformity to this opinion.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.